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In The

Supreme Court of the United States

STATE COMPENSATION INSURANCE FUND,

Petitioner,

v.

NANCY ZAMORA, Chapter 7 Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Kelly v. Robinson*, 479 U.S. 36 (1986), this Court held that criminal restitution ordered under state law is not dischargeable in a Chapter 7 bankruptcy because discharging the restitution obligation would violate the policy against federal interference with the state's interest in unfettered administration of its criminal justice system. *Kelly*, however, left unresolved the following related questions:

1. Whether the policy against federal interference with state criminal prosecutions similarly precludes a finding that state criminal restitution payments can be preferences under 11 U.S.C. § 547(b); and

2. Whether criminal restitution, which is ordered to further the state's goals of deterrence and rehabilitation, is "to or for the benefit of a creditor" under 11 U.S.C. § 547(b).

PARTIES AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Petitioner and defendant below, State Compensation Insurance Fund, is a division of the California Department of Industrial Relations and is an agency of the State of California. Cal. Const. art. XIV, § 4; Cal. Lab. Code § 56 (West 2003). No parent corporation or publicly held corporation owns State Fund.

Respondent and plaintiff below, is individual Nancy Zamora, the Chapter 7 Trustee for the estate of Jeffrey L. Silverman and Faye J. Silverman.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner State Compensation Insurance Fund respectfully seeks a writ of certiorari to review the published decision of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit announced its decision on August 12, 2010. The Ninth Circuit denied rehearing on September 14, 2010.

OPINIONS BELOW

The unpublished decision of the United States Bankruptcy Court for the Central District of California is reprinted in the appendix. (Pet. App. 26.) The unpublished decision of the United States District Court, Central District of California is reprinted in the appendix. (Pet. App. 22.) The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 616 F.3d 1001 and is reprinted in the appendix. (Pet. App. 1.) The unpublished order of the court of appeals denying rehearing is reprinted in the appendix. (Pet. App. 42.)

JURISDICTION

The court of appeals' opinion and judgment was entered on August 12, 2010. A timely petition for rehearing was denied on September 14, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 547(b) provides that a Trustee may recover the transfer of "an interest of the debtor in property" that is:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made –
>
> (A) on or within 90 days before the filing of the petition; or
>
> (5) that enables such creditor to receive more than such creditor would receive if –
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (2004).

STATEMENT

A. Jurisdiction in the First Instance.

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 147 and 1334 and 11 U.S.C. §§ 323, 541, 547, 550, and 551. The jurisdiction of the federal district court was invoked under 28 U.S.C. § 158(a) and 28 U.S.C. § 1291, based on its capacity to hear an appeal from the final judgment of a bankruptcy court.

B. Summary of Proceedings.

This petition arises from an adversary proceeding brought by Chapter 7 Trustee Zamora (Trustee) against defendant State Compensation Insurance Fund (State Fund) to avoid and recover as a preference a $101,531.00 criminal restitution payment made by debtor Jeffrey Silverman to the Los Angeles County District Attorney and then forwarded to the victim, State Fund. The bankruptcy court granted the Trustee's motion for summary judgment, finding that the restitution payment fell within the scope of the preference statute.

The district court affirmed the bankruptcy court's order and judgment. The Ninth Circuit affirmed, concluding that the preference statute applied to criminal restitution.

The Ninth Circuit then denied rehearing.

C. Factual and Procedural History.

1. The restitution award and completion of Mr. Silverman's probation.

State Fund provided a policy of workers' compensation insurance to Jeffrey and Faye Silverman for their contracting company. (Pet. App. 2.) On January 14, 2005, the Silvermans were indicted for insurance fraud under California Insurance Code section 11880(a). (Pet. App. 3.) They entered into a plea agreement and Mr. Silverman's sentence included probation, community service, and payment of $101,531.00 restitution to State Fund as the victim of the crime. (Pet. App. 30-31.) The amount of the restitution payment was determined by the criminal court upon a recommendation by law enforcement based on an estimate from State Fund of the appropriate amount of premium owed by the Silvermans absent the fraud. (Pet. App. 30.)

On March 18, 2005, the District Attorney's office sent a check to State Fund in the amount of $101,531.00. The accompanying letter indicated it was payment for the court-ordered restitution in the criminal proceeding.

On April 29, 2005, the Silvermans filed a petition for Chapter 7 bankruptcy. (Pet. App. 3.) Plaintiff Nancy Zamora was appointed Trustee. (Pet. App. 3.)

In December 2006, Mr. Silverman's probation was terminated on a finding that he had complied with the terms of the probation, including making

the $101,153.00 restitution payment to State Fund as the victim of the crime. Upon completion of the conditions of probation, the court released Mr. Silverman from all penalties and disabilities resulting from the offense (with the exception of certain disclosure requirements and a prohibition against owning firearms) and the case was closed. Because the criminal case is closed, the District Attorney has represented that he would not be able to recover the $101,153.00 in restitution if the Trustee takes back the money as a preference.

2. The adversary action against State Fund.

On April 5, 2007, after the criminal case was dismissed, the Trustee filed an adversary proceeding against State Fund to avoid and recover the restitution payment. (Pet. App. 3.) Both parties filed motions for summary judgment to determine whether the restitution payment qualified as a preference under 11 U.S.C. § 547(b). (Pet. App. 4.) The bankruptcy court denied State Fund's motion for summary judgment and granted the Trustee's motion. (Pet. App. 25, 27.) The bankruptcy court determined that criminal restitution was a "debt" under the bankruptcy statutes and was made "to or for the benefit of a creditor" for purposes of the preference statute. (Pet. App. 31-40.) The order was stayed pending appeal.

In an August 12, 2008 minute order, the district court affirmed the bankruptcy court's order. (Pet. App. 22-23.) The district court found that the plain

language of 11 U.S.C. § 547(b) and the weight of authority supported the bankruptcy court's conclusion that the restitution payment was an avoidable preferential payment. (Pet. App. 23.)

3. The Ninth Circuit opinion.

On August 12, 2010, the Ninth Circuit affirmed the district court's order. (Pet. App. 21.) Characterizing the issue as a "novel" one, the Ninth Circuit found the preference statute, 11 U.S.C. § 547(b), does not except criminal restitution payments. (Pet. App. 2.) The court noted that the statute's plain language does not contain such an exception (Pet. App. 10) and that the policy of avoiding federal interference with state criminal proceedings underlying this Court's finding in *Kelly v. Robinson*, 479 U.S. 36 (1986) was not implicated under 11 U.S.C. § 547(b). (Pet. App. 11-15.) According to the court, since the restitution obligation was not dischargeable, the avoidance of the restitution payment as a preference would not eliminate Mr. Silverman's obligation to pay the money to State Fund. (Pet. App. 13.)

The court further held that the restitution payment met the requirements of 11 U.S.C. § 547(b), including the requirement that the payment be "'to or for the benefit of a creditor.'" (Pet. App. 15-20.) The court acknowledged that the purpose of restitution is to further the state's sentencing goals of rehabilitation and deterrence. (Pet. App. 16.) However,

the court nevertheless concluded that the restitution payment was also "'to or for the benefit of a creditor'" because it accomplished the state's sentencing goals by compensating the victim for some, if not all, of the victim's loss. (*Id.*) Thus, the court concluded that even though the restitution benefitted society as a whole, it also benefitted State Fund. (*Id.*)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because this case presents an important question of federalism left unresolved by this Court's *Kelly* opinion. *Kelly* held that criminal restitution was not dischargeable in a Chapter 7 bankruptcy. In reaching that decision, this Court recognized the importance of a state's interest in administering its criminal laws without federal interference and held that this interest was one of the most powerful considerations influencing the interpretation of Bankruptcy Code provisions. *Kelly*, 479 U.S. at 49.

This Court has yet to speak on a related question – whether a criminal restitution payment can be avoided by the Chapter 7 Trustee as a preference. As demonstrated below, that question involves similar federalism concerns and whether those concerns take precedence over the desire of bankruptcy Trustees to obtain as much money as possible for the debtor's estate to distribute to civil creditors. Because criminal restitution is a common penalty imposed

in criminal cases, the issue is one of widespread importance and should be resolved by this Court. *See* Cal. Penal Code § 1202.4(a)(3) (West 2003) (requiring mandatory restitution in most cases in which victim incurs an economic loss as a result of the crime).

As this Court explained in *Kelly*, criminal restitution is made for the benefit of the state, and is not assessed "'for . . . compensation' of the victim." *Kelly*, 479 U.S. at 53. Although criminal restitution is paid to the victim, it is ordered to rehabilitate the criminal defendant and deter future criminal conduct. *Kelly,* at 49, n.10 ("[r]estitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. . . . Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine"). However, those goals are thwarted when the restitution that the criminal defendant has already paid to the victim is returned to his estate for the benefit of creditors, as it is unlikely the criminal defendant will ever repay the restitution once it is avoided as a preference.

Indeed, in this case, it appears Mr. Silverman may *not* be required to repay the restitution obligation. After paying the restitution to State Fund, his conviction was expunged, and the expungement order released him from "all penalties and disabilities" (which would presumably include the restitution obligation) flowing from the conviction. Thus, if his restitution payment is now avoided as a preference, he will have been able to recoup and re-allocate that

payment for the benefit of his civil creditors and then may never have to satisfy his obligation to make restitution.

But even in cases in which the restitution payment theoretically could be recovered, it is unlikely to happen as a practical matter. Because the Bankruptcy Code requires all claims (even tardily-filed unsecured claims) to be satisfied before non-dischargeable penalty claims in bankruptcy can be paid, it is unlikely that there would be sufficient funds in the bankruptcy estate to satisfy the restitution obligation. *See* 11 U.S.C. § 726(a)(4), (b) (2004). Nor is it likely that a criminal defendant will have funds to pay restitution after the bankruptcy estate is distributed and the bankruptcy proceedings are concluded. And while the victim can try to chase down the criminal defendant post-bankruptcy, if the criminal case has been closed (as in this case), there is no enforcement machinery in the criminal system, such as revocation of probation, to ensure payment of the obligation. Instead, the obligation takes on the character of a civil judgment, with the victim left to shoulder the burden of ensuring the goals of deterrence and rehabilitation, and a criminal defendant who no longer has the incentive to pay the obligation. Cal. Penal Code § 1202.4(a)(3) (West 2003) (criminal restitution shall be enforceable "as if the order were a civil judgment").

Not only does treating criminal restitution as a preference interfere with the enforcement of penal sanctions, it also interferes with the state's goals of rehabilitation. To encourage rehabilitation of criminal

defendants, California allows a criminal record to be expunged if the criminal defendant serves all the terms of his probation – including making any restitution payment – before probation is complete. However, if a criminal restitution payment is avoided as a preference before the end of probation (unlike this case in which the Trustee has attempted to avoid the payment after the probation was completed), the record likely will not be expunged because the restitution payment has not been made. Thus, the actions of the federal bankruptcy court may deprive the criminal defendant of the opportunity to clear his or her record, thereby interfering with the state's rehabilitation goal.

Since treating criminal restitution as a preference will interfere with state criminal proceedings, the preference statute, 11 U.S.C. § 547(b), should be construed with that effect in mind. Under that provision, one requirement for avoiding payments made by the debtor during the preference period is that the payments were made "to or for the benefit of a creditor." 11 U.S.C. § 547(b) (2004). As discussed, *Kelly* found that criminal restitution is made for the benefit of the state to further its rehabilitation and deterrence goals, not for the benefit of the victim. Accordingly, when the language of the statute is narrowly construed to avoid federal interference in state criminal matters – as it must be – criminal restitution is not made "to or for the benefit of a creditor" and does not fall within the scope of 11 U.S.C. § 547(b).

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION WHETHER CRIMINAL RESTITUTION IS A PREFERENCE UNDER 11 U.S.C. § 547.

A. Treating criminal restitution as a preference would interfere with state criminal proceedings.

11 U.S.C. § 547(b) treats a bankrupt debtor's estate as having been established ninety days prior to the debtor's filing of bankruptcy. *See County of Sacramento v. Hackney* (*In re Hackney*), 93 B.R. 213, 218 (Bankr. N.D. Cal. 1988). The statute allows creditors to recover certain payments made by the debtor during this ninety-day preference period. *Id.* The issue in this case is whether a criminal restitution payment made during the ninety-day preference period can be avoided under 11 U.S.C. § 547(b).

In *Kelly*, this Court addressed a similar question, and held criminal restitution was not dischargeable in a Chapter 7 bankruptcy for two reasons: (1) historically, criminal restitution was not dischargeable, despite clear statutory language in prior versions of the Bankruptcy Act suggesting the obligation should be discharged, *Kelly*, 479 U.S. at 40-47; and (2) the fundamental policy against federal interference with state criminal prosecutions required that a restitution obligation not be discharged. *Id.* at 47-50.

As to the second reason, this Court explained that principles of federalism should be applied in construing Bankruptcy Code provisions, and that the

state's interest in freedom from interference in criminal prosecutions is "one of the most powerful of the considerations that should influence a court considering equitable types of relief." *Id.* at 49. Since "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States," discharging a restitution obligation would interfere with the state's interest in enforcing its penal sanctions. *Id.* at 47. Such interference, "in turn, would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Id.* at 49.

The same analysis applies to the question whether criminal restitution payments can be avoided as preferences. First, as to historical precedent, there is a long history of construing the Bankruptcy Code in a manner that avoids interference with the state's interest in its criminal justice system. *Id.* at 44-45.

Second, just as making criminal restitution dischargeable in bankruptcy would interfere with the state's criminal justice system, so would allowing the Trustee to avoid restitution payments that have already been made. For one thing, avoiding criminal restitution payments interferes with the state's goal of enforcing its penal sanctions. Although, as the court of appeals found, the restitution obligation is not dischargeable in bankruptcy (Pet. App. 13), it may no longer be recoverable in some instances under state law if it is avoided as a preference. For instance,

under California Penal Code section 1203.4, when a defendant has fulfilled the conditions of probation, the defendant's criminal conviction can be expunged, his or her plea can be changed to one of not guilty, and "he or she shall thereafter be *released from all penalties and disabilities* resulting from the offense of which he or she has been convicted. . . ." Cal. Penal Code § 1203.4 (West 2004) (emphasis added). The term "penalties and disabilities" is broadly construed and refers to all criminal penalties and disabilities associated with the sentence, or anything akin thereto. *Kelly v. Mun. Court,* 160 Cal. App. 2d 38, 42 (1958). Thus, if the criminal defendant makes his restitution payment and his record is expunged before the restitution payment is avoided by the bankruptcy court, then the order expunging the conviction may very well preclude any efforts at enforcing the restitution obligation.

Indeed, that is the situation in this case. Before the Trustee filed this adversary action against State Fund, Mr. Silverman completed the terms of his probation, including the payment of restitution to State Fund. Consequently, the criminal action against him was dismissed and he was released from all "penalties and disabilities" resulting from the conviction. If the preference statute applies in this circumstance, Mr. Silverman will be able to re-allocate the restitution payment to the bankruptcy estate in order to pay civil creditors, and may not then have to repay the restitution because, under the expungement order, he has been released from all "penalties and

disabilities" resulting from the conviction. The possibility that he ultimately may not have to pay the restitution unquestionably interferes with the state's interest in enforcing its penal sanctions.[1]

Moreover, even setting aside the effect of California Penal Code section 1203.4, restitution, if avoidable as a preference, will likely remain unpaid in many instances despite being non-dischargeable in bankruptcy. Since criminal restitution is a non-dischargeable penalty, under the Bankruptcy Code, all other claims (including tardily-filed unsecured claims) will be paid from the debtor's estate before any funds would be available to pay restitution. *Findley v. State Bar of Cal.* (*In re Findley*), 387 B.R. 260, 268-69 (B.A.P. 9th Cir. 2008); 11 U.S.C. § 726(a)(4), (b) (2004). Thus, it is unlikely that restitution will be paid during the bankruptcy, and instead, would have to be paid after the bankruptcy is discharged. However, once the bankruptcy is discharged, there is no assurance there will be any funds available or the criminal defendant will have the same motivation to

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[1] In its opinion, the court of appeals stated: "[T]he Silvermans served their probation and are left with the criminal record. We cannot see, therefore, how application of § 547(b) to State Fund will compromise or dilute the Silvermans' state sentence (other than, of course, to potentially prolong the time when the Silvermans will fully satisfy their debt to State Fund)." (Pet. App. 14.) As explained, the application of the preference statute does potentially dilute the Silvermans' sentence because the Silvermans may not have to pay the restitution if it is avoided under the preference statute.

pay the restitution obligation. That is particularly true in this case since the criminal case was closed after the Silvermans served their probation. Without the threat of incarceration or revocation of probation for failure to pay the restitution, the likelihood that it will be paid is diminished. *See Zajder v. Hills Dep't Store* (*In re Zajder*), 154 B.R. 885, 888 (Bankr. W.D. Pa. 1993) ("there is no assurance that any funds will be paid. This debtor acknowledges that a portion of the criminal court order is not dischargeable but in fact, to this late date, has not seen fit to comply with even this criminal sanction. With the substantial passage of time, the overcrowded conditions of prison, and the fact that few criminal defendants are incarcerated for failure to pay money, it is not certain that any funds will be paid"). If a criminal defendant avoids his restitution obligation because he is no longer on probation, the goals of the sentencing scheme are undermined and the ability of state criminal judges to fashion the most effective punishment is hampered.[2] *Troff v. State of Utah*, 488 F.3d 1237, 1242-43 (10th Cir. 2007).

Avoiding restitution payments as preferences interferes with criminal proceedings in other ways.

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[2] Even assuming California Penal Code section 1203.4 does not preclude enforcement by a victim, leaving enforcement in the hands of the victim, who may not have the resources or motivation to collect on the restitution order, is not an effective means of furthering the state's goals of rehabilitation and deterrence.

First, if (unlike this case) the Trustee avoided a restitution payment *before* the end of the criminal defendant's probation, the criminal defendant would be denied the opportunity to have his or her record expunged under California Penal Code section 1203.4. The purpose of section 1203.4 is to encourage rehabilitation of criminals; the expungement is "in essence, a form of legislatively authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation." *People v. Covington*, 82 Cal. App. 4th 1263, 1270 (2000). A record cannot be expunged, however, if court-ordered restitution is not paid in full during the probationary period. *Id.* Thus, if a criminal defendant's payment during his or her probation is avoided as a preference, he or she will not be able to pay the restitution in full during the probationary period, despite a willingness to do so, in order to have his or her criminal record expunged.

Second, to avoid equal protection concerns and to give indigent defendants the opportunity to have their criminal records expunged, California Penal Code section 1203.2 allows the court to order restitution based on the defendant's "ability to pay." *Covington*, 82 Cal. App. 4th at 858. However, the possibility that criminal restitution payments can be avoided as a preference complicates the criminal judge's determination of the appropriate amount of restitution under the "ability to pay" provision. In determining the amount of restitution, the court will have to consider not only the defendant's ability to pay, but the

likelihood that the defendant will declare bankruptcy, and whether the Trustee would attempt to avoid restitution payments made during the preference period. Consequently, treating restitution payments as a preference "would hamper the flexibility of state criminal judges in choosing the combination of imprisonment, fines, and restitution most likely to further the rehabilitative and deterrent goals of state criminal justice systems." *Kelly*, 479 U.S. at 49.

Finally, applying the preference statute to criminal restitution would burden state officials and victims. In *Kelly*, this Court found that requiring state officials to object to discharge of a restitution order in the bankruptcy proceeding (as opposed to making the restitution automatically non-dischargeable) would impose burdens and uncertainty on state officials, and that it would be unseemly to require state prosecutors to submit the judgments of their criminal courts to federal bankruptcy courts. *Id.* at 48. Similarly here, it would be burdensome and unseemly to require state officials (who typically first take possession of the restitution payment) or the victim to be the subject of an adversary action to recover restitution as a preference. As the court in *Becker v. County of Santa Clara* (*In re Nelson*) explained:

> If anything, avoidance of restitution obligations is seemingly more intrusive and disruptive of the state's criminal justice system than discharge of restitution. Far beyond merely extinguishing a debt that *ought* to be paid in the future, the trustee seeks to

> recover restitution that *has* been paid; plaintiff attempts to reach into the coffers of the county that convicted the debtor of her crime, and even into the pockets of the individual victim of her theft. Plaintiff's claim would thus turn the state's criminal justice system on its head in a federal bankruptcy proceeding: the state and the crime victim are the defendants, the criminal is the complainant. There can be no doubt that such an ironic and unseemly specter would impose undue burdens and uncertainties on the state (not to mention the victim), would lead to federal remission of state criminal judgments, and would hamper the sentencing decisions of state judges.

Becker v. Cnty. of Santa Clara (In re Nelson), 91 B.R. 904, 906 (Bankr. N.D. Cal. 1988).

In sum, allowing the Trustee to recover as a preference a criminal restitution payment would interfere with the state's right to enforce its penalties and encourage rehabilitation and would impose burdens and uncertainty on state officials and victims of crimes.

B. The court of appeals' focus on the rights of civil creditors is misplaced.

In finding that the preference statute applied to criminal restitution, the court of appeals focused on the rights of civil creditors. It held that excepting criminal restitution from the application of 11 U.S.C.

§ 547(b) would preclude a more equitable distribution of a bankruptcy estate's assets and would allow a debtor to pay off a non-dischargeable debt during the preference period, potentially leaving the creditors with nothing. (Pet. App. 14-15.)

The concern for creditors should not be relevant to enforcement of criminal sentences. "'The purpose of bankruptcy is to protect those in financial, not moral, difficulty.'" *Gruntz v. Cnty. of Los Angeles*, 202 F.3d 1074, 1085 (9th Cir. 2000). Thus, "[t]he provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditor, as such, and not to punishments inflicted pro bono publico for crimes committed." *In re Moore*, 111 F. 145, 150 (W.D. Ky. 1901).

In other words, simply because Mr. Silverman's sentence involves the payment of money does not mean that federal courts should be able to interfere with it. It would be unthinkable for a bankruptcy court to delay or suspend a debtor's jail time or revoke a sentence of community service; yet, the court of appeals' decision has the same effect on a sentence of criminal restitution. "[T]here is 'no rationale or justification for severing economic and noneconomic ramifications of the debtor's criminal conduct.'" *Gruntz*, 202 F.3d at 1085-86 (quoting 3 Collier on Bankruptcy 362-48 (15th ed. 1999)). Consequently, when applying the preference statute, the concerns of creditors involving *civil* debts should be subordinated to the state's concerns in administering its *criminal* justice system. *See id.* at 1086 (noting that "in the

case of the automatic stay, Congress has specifically subordinated the goals of economic rehabilitation and equitable distribution of assets to the states' interest in prosecuting criminals"); *Troff v. State of Utah* (*In re Troff*), 329 B.R. 85, 91 (Bankr. D. Utah 2005) (noting Senate Judiciary Committee report that purpose of amendment to Bankruptcy Code effectively overruling *Pennsylvania Department of Public Welfare v. Davenport,* 495 U.S. 552 (1990) – which held that criminal restitution obligations are dischargeable debts under chapter 13 – was to "'prevent Federal bankruptcy courts from invalidating the results of State criminal proceedings'").

The purpose of the preference statute is to discourage creditors "'from racing to the courthouse to dismember the debtor during his slide into bankruptcy'" and to "'facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.'" *Valley Bank v. Vance* (*In re Vance*), 721 F.2d 259, 260 (9th Cir. 1983). The preference law also prevents a debtor from intentionally committing a fraud upon his creditors by voluntarily transferring property to another. *Gray v. Fla. State Univ.* (*In re Dehon, Inc.*), 327 B.R. 38, 61 (Bankr. D. Mass. 2005).

The purposes behind the preference statute are not served by treating criminal restitution as a preference. A payment of criminal restitution during the preference period is not made in an attempt to defraud civil creditors. It is a *mandatory* requirement that a criminal defendant must satisfy to fulfill his sentence, and his failure to make that payment could

result in the revocation of probation. Nor could there be any attempt by the state, to whom the restitution is initially paid, to obtain an advantage over civil creditors. As discussed, the state imposes restitution obligations to rehabilitate and deter the criminal defendant, not to keep civil creditors from obtaining the defendant's money.

In short, the state's interest in unfettered administration of its criminal justice system must take precedence over the interest of civil creditors in accumulating money in the bankruptcy estate. The court of appeals erred in giving priority to the interests of civil creditors.

C. Criminal restitution is not "to or for the benefit of a creditor."

One of the statutory elements that must be satisfied before the Trustee may recover a payment made by the debtor during the preference period is that the payment was "to or for the benefit of a creditor." 11 U.S.C. § 547(b). Like all other provisions of the Bankruptcy Code, this language should be considered "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." *Kelly*, 479 U.S. at 43-44. Because these interests must be considered,

there are some instances in which literal construction is not permissible.[3] *In re Moore*, 111 F. at 148-49.

When viewed in light of the deference due state criminal judgments, criminal restitution is not "to or for the benefit of a creditor." Instead, it is "to or for the benefit of" the state or society. "Once the state has made an independent decision to file criminal charges, the prosecution belongs to the government, not to the complaining witness." *Gruntz*, 202 F.3d at 1086; *see also id.* ("[A]ny criminal prosecution of the debtor is on behalf of all the citizens of the state, not on behalf of the creditor"). Consequently, the penalties imposed on the criminal defendant, including restitution, are similarly for the benefit of society, not the victim.

Indeed, this question was already resolved in *Kelly*. There, this Court found that criminal restitution was not dischargeable under 11 U.S.C. § 523(a)(7), which protects from discharge any debt that is for a "fine, penalty or forfeiture to and for the

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[3] Thus, for instance, as this Court noted in *Kelly*, court decisions interpreting prior versions of the Bankruptcy Code found that criminal restitution was not dischargeable, despite plain language to the contrary. *Kelly*, 479 U.S. at 44-45 ("The most natural construction of the [1978] Act, therefore, would have allowed criminal penalties to be discharged in bankruptcy, even though the government was not entitled to a share of the bankrupt's estate. . . . But the courts did not interpret the Act in this way. Despite the clear statutory language, most courts refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court").

benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. § 523(a)(7). The Court explained:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Kelly, 479 U.S. at 52. Thus, this Court concluded, "[b]ecause criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation, we conclude that restitution orders imposed in such proceedings operate 'for the benefit of' the State. *Similarly, they are not assessed 'for . . . compensation' of the victim*." *Id.* at 53 (emphasis added).

The court of appeals acknowledged *Kelly*'s holding that restitution furthers the state's sentencing goals. (Pet. App. 16.) However, it held that criminal restitution is also for the benefit of a creditor because it directly compensates the victim for some, if not all, of the victim's loss. (Pet. App. 16.) This conclusion,

however, is directly contrary to this Court's holding that criminal restitution is not assessed "'for . . . compensation' of the victim." *Kelly*, 479 U.S. at 53. The fact that the victim may obtain an incidental benefit from a restitution payment does not mean that the payment was *intended* to benefit the victim.

The court of appeals supported its holding by noting that under California Penal Code provisions, (1) the restitution amount is based on the amount of loss claimed by the victim, (2) the restitution shall be enforceable as if it were a civil judgment, and (3) the restitution is to be paid directly to the victim.[4] (Pet. App. 17-18.) Thus, it concluded that the victim had extensive control over the payment's enforcement, which established the victim's interest in and benefit from the payment. (Pet. App. 17.)

However, these provisions do not show that the *purpose* of the restitution payment was to benefit the victim. In cases involving similar circumstances, courts have held that criminal restitution is not dischargeable under 11 U.S.C. § 523(a)(7) because the restitution is still for the benefit of a governmental unit. *See Colton v. Verola*, 446 F.3d 1206, 1207, 1209 (11th Cir. 2006) (criminal restitution payment that was paid to department of corrections and then

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[4] Although restitution is enforceable in the manner of a civil judgment, there is no actual money judgment; instead, the execution is on the restitution order already entered. *People v. Hart*, 65 Cal. App. 4th 902, 906 (1998).

forwarded to victim was not dischargeable); *Reif v. Kaster* (*In re Reif*), 363 B.R. 107, 109-10 (Bankr. D. Ariz. 2007) (criminal restitution payment is non-dischargeable even if it is "ultimately paid to the victim rather than the state and notwithstanding the fact that the restitution amount is equivalent to the victim's loss"); *but see Nat'l Auto Sales, Inc. v. Wilson* (*In re Wilson*), 299 B.R. 380, 384 (Bankr. E.D. Va. 2003) (criminal restitution to be paid in an amount determined in a civil trial brought by victim was dischargeable in bankruptcy). Nor does it matter that the restitution could be enforced as a civil judgment. As the Tenth Circuit explained, although the fact that restitution converted to a civil judgment after the debtor served his sentence may alter the consequences of the debtor's non-payment, it does not change the fact that the restitution was part of a criminal sentence. *Troff*, 488 F.3d at 1241 n.1. The same is true here.

In short, none of the factors relied upon by the court of appeals changes the purpose behind the restitution sentence, which is to benefit society, not the victim. Thus, especially when 11 U.S.C. § 547(b) is construed in deference to the state's interest in avoiding federal interference with its criminal justice system, criminal restitution is not paid "to or for the benefit of a creditor." 11 U.S.C. § 547(b). The preference statute does not apply.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of: JEFFREY L. SILVERMAN; FAYE J. SILVERMAN, *Debtors*,	
STATE COMPENSATION INSURANCE FUND, *Appellant*, v. NANCY HOFFMEIER ZAMORA, Chapter 7 Trustee, *Appellee*.	No. 08-56508 D.C. No. 2:08-cv-01311-VBF OPINION

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Argued and Submitted
February 1, 2010 – Pasadena, California

Filed August 12, 2010

Before: Mary M. Schroeder, Raymond C. Fisher and N. Randy Smith, Circuit Judges.

Opinion by Judge N.R. Smith

COUNSEL

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OPINION

N.R. SMITH, Circuit Judge:

In this appeal, we are asked to resolve two novel questions: (1) whether district court decisions bind bankruptcy courts in other districts and (2) whether criminal restitution payments are recoverable by a trustee in bankruptcy as preferences under 11 U.S.C. § 547(b). We conclude that (1) district courts do not bind bankruptcy courts in other districts and (2) criminal restitution payments, so long as they otherwise meet the statutory requirements of § 547(b), are recoverable by a trustee as preferences.

I. Background

Jeffrey and Faye Silverman owned and operated an electrical contracting company, for which State Compensation Insurance Fund ("State Fund") provided workers' compensation insurance for the 2002, 2003, and 2004 policy periods. Sometime in October

2004, the Silvermans began participating in a scheme, wherein they underreported payroll, underpaid premiums, and prevented injured workers from obtaining benefits under the workers' compensation law. The government discovered the fraud and indicted the Silvermans for insurance fraud under California Insurance Code section 11880(a). The Silvermans pleaded nolo contendere and were convicted pursuant to a plea agreement in March 2005, shortly after paying $101,531 in restitution to State Fund, with the payment included as part of the court-ordered sentence.

A. Bankruptcy Court Proceedings

On April 29, 2005, the Silvermans filed a petition for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Central District of California, and a bankruptcy trustee, Nancy Zamora ("the Trustee"), was appointed. 11 U.S.C. § 547(b) outlines that a trustee may recover the transfer of "an interest of the debtor in property" that is "(1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent;" and that was "(4) made . . . on or within 90 days before the date of the filing of the [bankruptcy] petition." Believing that the restitution payment fit this statutory definition, the Trustee filed adversary proceedings against State Fund on April 5, 2007 to recover the criminal restitution payment.

State Fund and the Trustee filed cross-motions for summary judgment in the bankruptcy court. The Trustee argued that the payment met the facial requirements of § 547(b). State Fund argued that § 547(b) does not apply to criminal restitution payments in any event. State Fund relied mainly on *Kelly v. Robinson*, 479 U.S. 36 (1986), in which the Supreme Court found that criminal restitution payments were non-dischargeable in bankruptcy, and *Becker v. County of Santa Clara (In re Nelson)*, 91 B.R. 904 (N.D. Cal. 1988), in which the Northern District of California ruled that, because criminal restitution payments are non-dischargeable under *Kelly*, they are not preferences under § 547(b).

The bankruptcy court found *Kelly* distinguishable and declined to follow *Nelson*, finding it unpersuasive. The bankruptcy judge stated:

> I do not find [*Nelson*] persuasive. The *Kelly* opinion dealt with dischargeability, not avoidability. Indeed, even the *Nelson* court conceded that the "historical exception to avoidance of restitution does not appear to be as clearly established as the exception for discharge of restitution . . . ."

Having found that all the elements of § 547 had been met, the bankruptcy court concluded that the Trustee could recover the restitution payment. The bankruptcy court proceeded to give two additional reasons for its ruling. First, the court noted that "if Congress intended to exclude restitution awards from a preference action, it knows exactly how to do it . . . ."

Second, the court found no good public policy reason to treat criminal restitution payments differently from any other payments received during the preference period.

B. District Court Proceedings

State Fund appealed the bankruptcy court's order to the district court, and the district court affirmed on August 12, 2008. The district court stated:

> [T]he plain language of 11 U.S.C. § 547 and the weight of legal authority support the Bankruptcy Court's finding that the restitution payment to Appellant was an avoidable preferential payment .... This Court finds that [*Nelson*] is non-binding precedent, and [*Kelly*] is factually distinguishable.
>
> State Fund now appeals.

II. Standard of Review

"Because this court is in as good a position as the district court to review the findings of the bankruptcy court, it independently reviews the bankruptcy court's decision." *In re Allen*, 300 F.3d 1055, 1058 (9th Cir. 2002) (quoting *Ragsdale v. Haller*, 780 F.2d 794, 795 (9th Cir. 1986)). "We review the bankruptcy court's conclusions of law de novo and review its findings of fact for clear error." *Id.* Because neither party disputes any of the bankruptcy court's factual findings, we address only the bankruptcy court's conclusions of law.

III. Discussion

On appeal, State Fund argues both that: (1) the Northern District of California's ruling in *Nelson* was binding on the bankruptcy court and, therefore, the bankruptcy court erred by not following it; and (2) 11 U.S.C. § 547(b)'s prohibition on preferences does not apply to criminal restitution payments. We reject both arguments and affirm the district court.

A. District Court Decisions do not Bind Bankruptcy Courts in other Districts

State Fund argues that, because "[b]ankruptcy courts should be bound by published district court bankruptcy appellate decisions," the bankruptcy court erred when it failed to follow the authority of the *Nelson* holding (which would have vindicated State Fund's position). In support of its argument, State Fund first assumes that Bankruptcy Appellate Panel ("BAP") decisions bind all bankruptcy courts in the Circuit. It then reasons that, because BAP decisions cannot bind district courts, the BAP is "inferior" to district courts. Therefore, State Fund argues, "one would expect that published decisions of a district court, acting in its appellate capacity, should equally bind all bankruptcy courts in the Ninth Circuit." We disagree.

At present, there is no controlling case law directly on this point. However, we now make clear that a bankruptcy court is not bound by a district

court's decision from another district. There are logical reasons for our decision.

First, State Fund has structured its argument on a false premise; we have never held that all bankruptcy courts in the circuit are bound by the BAP. *See, e.g., Bank of Maui v. Estate Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990).[1]

Second, bankruptcy court decisions cannot be appealed to district courts in other districts. Therefore, it makes little sense for such district court decisions to have precedential authority over out-of-district bankruptcy courts. We have also held that "[t]he doctrine of stare decisis does not compel one district court judge to follow the decision of another." *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977). Were we to hold that bankruptcy courts are bound by all district court decisions within the circuit, rather than only the decision of the district judge to whom their ruling has been appealed, bankruptcy courts would be subject to a potentially non-uniform body of law.[2] We therefore

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[1] Nevertheless, we treat the BAP's decisions as persuasive authority given its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law throughout the Ninth Circuit. *See In re Rosson*, 545 F.3d 764, 772 n.10 (9th Cir. 2008); *Bank of Maui*, 904 F.2d at 472 (O'Scannlain, J., specially concurring).

[2] This case does not present the question whether bankruptcy courts are bound by all the decisions of all the district judges within the district where the bankruptcy court sits. We recognize that, because district judges within a district do not

(Continued on following page)

hold that the bankruptcy court in this case (located in the Central District of California) was not bound by the *Nelson* holding (a decision by a district judge in the Northern District of California).

B. Criminal Restitution Payments are Subject to 11 U.S.C. § 547(b)

"'The starting point for our interpretation of a statute is always its plain language.'" *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1032 (9th Cir. 2009) (citation omitted). "The plain meaning governs unless a clearly expressed legislative intent is to the contrary, or unless such plain meaning would lead to absurd results." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citation omitted). "To determine plain language we consider 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Rowe*, 559 F.3d at 1032 (citation omitted). Therefore, we begin our analysis of § 547(b) by examining its text and background.

11 U.S.C. § 547(b) states:

> [T]he trustee may avoid any transfer of an interest of the debtor in property –
>
> **(1)** to or for the benefit of a creditor;

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bind each other, such a requirement could create the same problem of subjecting bankruptcy courts to a non-uniform body of law.

> **(2)** for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> **(3)** made while the debtor was insolvent;
>
> **(4)** made –
>
> > **(A)** on or within 90 days before the date of the filing of the petition; . . .
>
> . . . .
>
> **(5)** that enables such creditor to receive more than such creditor would receive if –
>
> > **(A)** the case were a case under chapter 7 of this title;
> >
> > **(B)** the transfer had not been made; and
> >
> > **(C)** such creditor received payment of such debt to the extent provided by the provisions of this title.

"The purpose of this provision is to discourage creditors 'from racing to the courthouse to dismember the debtor during his slide into bankruptcy' and to 'facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.'" *Valley Bank v. Vance (In re Vance)*, 721 F.2d 259, 260 (9th Cir. 1983) (citing H.R. Rep. No. 95-595, pt. 3, at 177-78 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6138). Section 547(b) furthers this goal by treating a debtor's bankruptcy estate as having been

established ninety days prior to the debtor's filing of bankruptcy, which would have the incidental effect of making the debtor insolvent during that same time period. *See County of Sacramento v. Hackney (In re Hackney)*, 93 B.R. 213, 218 (Bankr. N.D. Cal. 1988) (explaining the policy purpose behind preference statutes). Since an insolvent debtor has no equity in the bankruptcy estate, any payments made during the ninety-day period are considered to have been made by the other creditors of the estate, not the debtor. *Id.* In order to prevent the creditors from losing their interests in the bankruptcy estate via the debtor's payments during the ninety-day period, the preference statute allows the creditors of the estate to recover certain payments made by the debtor during the preference period. *Id.*

The plain language of § 547(b) does not except criminal restitution payments. State Fund has not argued there is any clearly expressed legislative intent to the contrary or that any absurd results might flow from application of § 547(b) to criminal restitution payments. Under the plain language of § 547(b), therefore, we hold that criminal restitution payments (if they otherwise meet the statutory requirements of § 547(b)) are recoverable preferences in Chapter 7 bankruptcy.

Notwithstanding the plain language of the statute, State Fund now argues that § 547(b) does not apply to criminal restitution payments, because there is a judicial exception to preference statutes for criminal restitution payments and Congress did not

explicitly abrogate that doctrine in enacting § 547(b). In the alternative, State Fund argues that the Silvermans' payment to State Fund does not meet the first requirement under § 547(b), because it was not "to or for the benefit of a creditor." We address each argument in turn.

1. There is no Judicial Exception for Criminal Restitution Payments under Section 547(b)

State Fund argues that criminal restitution payments should be excepted from the preference statute, even if the statute does not, on its face, create such an exception. It bases this argument on the Supreme Court's holding in *Kelly*, 479 U.S. at 36. There, the Court was asked to determine whether criminal restitution payments were dischargeable in Chapter 7 bankruptcy. Section 523(a)(7) excludes from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit . . . ." Absent from this list are criminal restitution payments. Thus, 11 U.S.C. § 523(a)(7) does not, on its face, exclude criminal restitution payments from the default requirement that all debts are discharged in Chapter 7 bankruptcy.

Nevertheless, the Court noted that, "[i]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and

policy." *Kelly*, 479 U.S. at 43 (quotation marks and citation omitted). The Court, therefore, "consider[ed] the language of §§ 101 and 523 in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems." *Id.* at 43-44. The Court observed that "Congress enacted [§ 523] in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders . . . ." *Id.* at 46. Therefore, because Congress had not explicitly overruled the well-established judicial exception exempting criminal restitution payments from dischargeability statutes, the Court declined to read the statute as doing so. *Id.* at 47.

In *Kelly*, the Court gave two reasons for finding a judicial exception to § 523 for criminal restitution payments: (1) there was a long history of this judicial exception for restitution payments in discharge statutes and (2) allowing criminal restitution payments to be discharged in bankruptcy would disturb state criminal proceedings. Neither of these rationales applies to § 547.

We find scant and unpersuasive evidence of an historical exception to preference statutes for criminal restitution payments. Even the *Nelson* court admitted that "an historical exception to avoidance of restitution does not appear to be as clearly established as the exception for discharge of restitution." *Nelson*, 91 B.R. at 906. Thus, whereas "Congress enacted [§ 523] against the background of an established

judicial exception to discharge for criminal sentences, including restitution orders," *Kelly*, 479 U.S. at 46, Congress did not enact § 547 against a similar background.

Nor is the major policy concern underlying the judicial exception to § 523 for criminal restitution payments implicated under § 547(b). The *Kelly* Court noted "the basis for this judicial exception [in the discharge context], [is] a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." 479 U.S. at 47. The Court proceeded to note that, "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States. [The Supreme Court] has emphasized repeatedly 'the fundamental policy against federal interference with state criminal prosecutions.'" *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

Allowing the Trustee to recover the restitution payment to State Fund will not interfere with California's state criminal proceedings. As *Kelly* made clear, criminal restitution payments are non-dischargeable.[3] Therefore, the Trustee's recovery of the restitution payment will not eliminate the Silvermans' obligation to pay the restitution money to State Fund post-bankruptcy; the Silvermans are

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[3] And as explained *infra*, finding that a criminal restitution payment is non-dischargeable under § 523(a) does not preclude finding the same payment recoverable under § 547(b).

stuck with that obligation until their debt has been fully satisfied. In addition, the Silvermans served their probation and are left with the criminal record. We cannot see, therefore, how application of § 547(b) to State Fund will compromise or dilute the Silvermans' state sentence (other than, of course, to potentially prolong the time when the Silvermans will fully satisfy their debt to State Fund).[4]

Additionally, allowing an exception to § 547(b) for criminal restitution payments would frustrate the purposes of the preference statute. Instead of allowing more equitable distribution of a bankruptcy estate's assets, excepting non-dischargeable debts like criminal restitution payments from § 547(b) would allow a debtor to pay off this non-dischargeable debt during the preference period and leave other creditors with nothing. For example, if the Silvermans' entire bankruptcy estate were worth the $101,531 paid to State Fund and this payment were not recoverable, then paying this debt before bankruptcy would enable the Silvermans to emerge debt free without having

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[4] The *Nelson* court relied entirely on this policy consideration in making its holding. *Nelson*, 91 B.R. at 906-07. Specifically, *Nelson* held that avoidance of criminal restitution payments poses significant interference with a state's criminal justice system, because "[f]ar beyond merely extinguishing a debt that *ought* to be paid in the future, the trustee seeks to recover restitution that *has* been paid." *Id.* at 906. As we have noted, however, criminal restitution payments are non-dischargeable and allowing a party to recover such payments under § 547(b) will not extinguish, or otherwise dilute, the defendant's obligations to make the payment.

paid anything to their other creditors. Excepting criminal restitution payments from § 547(b) would, therefore, motivate debtors to pay off these non-dischargeable debts during the preference period, leaving all other debts to be extinguished in bankruptcy. An economically rational debtor would likely prefer this outcome over one where the debtor is left with non-dischargeable debts post-bankruptcy.

The plain language of the statute does not except criminal restitution payments, and there is no historical justification or compelling policy reason for excepting them in spite of the plain language. We hold, therefore, that § 547(b) does not except criminal restitution payments wholesale; only where such payments do not meet the requirements of § 547(b) can they be excepted from this statute.

2. The Restitution Payment was "to or for the Benefit of" State Fund

Alternatively, State Fund argues that, even if there is no general exception to § 547(b) for criminal restitution payments, the Silvermans' payment in this case did not meet the statutory requirements of § 547(b): the payment was not "to or for the benefit of a creditor." 11 U.S.C. § 547(b)(1). Rather, State Fund argues, the restitution payment was "to or for the benefit of society as a whole." We disagree.

State courts employ a variety of tools to further their sentencing goals, including ordering restitution payments to the victim of a crime. "A restitution

order requires the criminal offender to pay money or to render services to his victim in order to redress the loss he has inflicted." *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 932 (1984) (footnote omitted). The remedy of restitution is unique, as "it forces the defendant to confront, in concrete terms, the harm his actions have caused," in contrast to traditional fees or sentences, which are often "calculated without regard to the harm the defendant has caused." *Kelly*, 479 U.S. at 49 n.10. Thus, restitution furthers the traditional sentencing goals of rehabilitation and deterrence, by forcing defendants to directly witness the effects of their crimes. *Id.* The *purpose* of restitution, therefore, is not merely to compensate the victim; it is to further the state's sentencing goals. *Id.* at 49 n.10, 52-53. But of course, court-ordered restitution payments accomplish this goal by requiring the defendant to directly compensate a victim for some, if not all, of the victim's loss. *See id.* at 52-53. Thus, it only makes sense that a court-ordered restitution payment is "to or for the benefit of the [victim/]creditor," even if the restitution payment's broader purpose is to further the state's sentencing goals.

Here, the Silvermans defrauded State Fund out of approximately $101,531 (by State Fund's own estimate), which the state court ordered the Silvermans to pay back in full to State Fund. It seems rather clear that, even if this payment benefitted society as a whole, it also benefitted State Fund.

To the extent it is not clear that the Silvermans' payment was "to or for the benefit of" State Fund, California's statutory scheme for criminal restitution payments erases any doubt. First, California Penal Code section 1202.4(f) notes that the amount of restitution awarded is "based on the amount of loss claimed by the victim." Though it is unknown "how much premium would have been due for the workers' compensation services provided to the Silvermans under their Policy, had they not committed fraud," the $101,531 eventually paid to State Fund was based on State Fund's own calculations. Thus, State Fund derived a benefit from the court-ordered restitution payment, because the payment was based on State Fund's own estimated loss.

Second, California Penal Code section 1202.4 holds that "in addition to any other penalty provided or imposed under the law, [the court] shall order the defendant to pay . . . [r]estitution to the victim . . . which shall be enforceable *as if the order were a civil judgment*." California Penal Code § 1202.4(a)(3) (emphasis added). Being able to enforce the restitution order as a civil judgment, State Fund had extensive control and discretion of the payment's execution, which further establishes State Fund's interest/benefit in the payment.

Finally, California Penal Code section 1202.4(a)(1) commands that the victim "shall receive restitution directly from [the] defendant . . . ." Consistent with this statute, the Silvermans paid the restitution payment via a cashier's check made out only to State

Fund. State Fund can hardly claim to have not received a benefit from such a direct and exclusive payment. Therefore, we hold that the Silvermans' payment was "to or for the benefit of" State Fund under § 547(b).[5]

State Fund, relying on language in *Kelly*, nonetheless argues that, because the payment was "to and for the benefit of society as a whole," it could not have been for its own benefit. In *Kelly*, the Supreme Court stated that, "[t]he criminal justice system is not operated primarily for the benefit of victims, *but for the benefit of society as a whole*." 479 U.S. at 52 (emphasis added). It further noted that "restitution orders imposed in such proceedings *operate 'for the benefit of' the State*." *Id.* at 53 (emphasis added). Thus, because "[c]riminal restitution does not create a financial debt between private individuals, but

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[5] We also note our prior case law, which (though not directly on point) provides useful guidance. In *California Trade Technical School, Inc. v. United States (In re California Trade Technical Schools, Inc.)*, 923 F.2d 641, 648 (9th Cir. 1991), we addressed a Chapter 7 bankruptcy trustee's efforts to recover payments made by the debtor, California Trade Technical Schools, to the Department of Education for federal student assistance program monies that the debtor still owed. We noted that civil restitution payments owed the Department of Education under § 547(b)(1) were "to or for the benefit of a creditor [i.e., the Department of Education]." *Id.* That outcome underscores our holding here that payments that benefit society as a whole (as the payment to the DOE would have, and as the payment to State Fund would) may also benefit the specific creditor, which makes such payments "to or for the benefit of a creditor."

rather to the People of the State of California," State Fund argues, the restitution payment could not be "to or for the benefit of" State Fund.

This argument ignores the contextual differences between the dischargeability statute being analyzed in *Kelly* and the preference statute being analyzed here. In *Kelly*, the Court was analyzing 11 U.S.C. § 523(a)(7), which excepts from discharge in bankruptcy any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . ."[6] As noted, the *Kelly* court held that § 523 applied to criminal restitution payments. Having so concluded, the Court proceeded to evaluate whether criminal restitution payments were "to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss." *Kelly*, 479 U.S. at 52. Our analysis here, however, examines whether a payment was made "to or for the benefit of a creditor" under § 547(b). The two standards are not mutually exclusive.

Merely because a payment is "to and for the benefit of society" under § 523(a)(7) does not mean

---

[6] To be clear, the Supreme Court interpreted the phrase "to and for the benefit of a governmental unit" to more broadly mean "[to and] for the benefit of society as a whole." *Kelly*, 479 U.S. at 51-52. Thus, for purposes of this analysis, references to a payment being "to and for the benefit of society as a whole" under § 523(a)(7) are the equivalent of being "to and for the benefit of a governmental unit" under that same section.

that payment cannot also be "to or for the benefit of a creditor" under § 547(b)(1). Nothing in *Kelly* suggests that we should hold to the contrary. Nor does it make sense to hold that a restitution payment, which benefits society as a whole, cannot also benefit the victim, who is paid as part of the restitution payment. Moreover, the *Kelly* Court's holding that restitution payments are not assessed for the purpose of compensating the victim does not preclude our finding that restitution payments may nonetheless benefit the victim-recipients. And of course, if the rule were otherwise, non-dischargeable criminal restitution payments could never be recoverable as preferences. As noted above, such a result would frustrate the purposes of the preference statute. Therefore, we do not read *Kelly* to hold that restitution payments are exclusively "to and for the benefit of society as a whole."

These considerations all lead us to conclude that, while the restitution payment to State Fund may have benefitted society, it was also "to or for the benefit" of the Silvermans' creditor, State Fund. The Silvermans' payment, therefore, meets the first prong of § 547(b). Because State Fund concedes the remaining requirements have been met, we hold the Silvermans' restitution payment to State Fund was a recoverable preference under § 547(b).

IV. Conclusion

The bankruptcy court did not err in declining to apply the ruling in *Nelson*; district courts do not bind bankruptcy courts in other districts. Nor did the district court err in allowing the Trustee to recover the Silvermans' payment to State Fund. The plain language of § 547(b) does not except criminal restitution payments, and we do not disrupt that plain language in our holding today. While we do not read statutes to abrogate well-established common law in the absence of any explicit congressional intent to do so, there is simply no evidence of a well-established judicial exception for criminal restitution payments from preference statutes. Further, such an exception would not make sense in light of the policy goals of the preference statute. Lastly, the payment was "to or for the benefit of" State Fund, even if it also indirectly benefitted society. We, therefore, affirm the district court's grant of the Trustee's summary judgment motion.

AFFIRMED

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-1311-VBF Dated: August 12, 2008

Title: In Re: Jeffrey L. Silverman, et al.

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Rita Sanchez Courtroom Deputy	None Present Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None Present	**None Present**
PROCEEDINGS (IN CHAMBERS):	**RULING ON SUBMITTED MATTER AFFIRMING ORDERS OF BANKRUPTCY COURT**

This Court has read and considered the appeal of the Defendant Appellant State Compensation Insurance Fund ("Appellant") from the decision of the Bankruptcy Court denying Appellant's motion for summary judgment, and granting the motion for summary judgment of Plaintiff Appellee Nancy H. Zamora, the chapter 7 trustee ("Appellee"). The Bankruptcy Court's Orders were filed on January 25, 2008. In addition to the Appellant's Brief and

Appendix, this Court read and considered the Appellee's Brief and Appellant's Reply Brief. After further consideration of the papers filed, the authorities cited, and counsel's oral argument at the hearing on August 11, 2008, this Court **AFFIRMS** the Orders and final judgment of the Bankruptcy Court.

Although Appellant makes some important arguments, this court finds that the Bankruptcy Court correctly applied the law. As Appellee asserts, the plain language of 11 U.S.C. § 547 and the weight of legal authority support the Bankruptcy Court's finding that the restitution payment to Appellant was an avoidable preferential payment. *See* Appellee's Brief, the record of oral argument at the August 11, 2008 hearing, and the January 9, 2008 tentative ruling of Judge Geraldine Mund. This Court finds that *Becker v. County of Santa Clara* (*In re Nelson*), 91 B.R. 904 (Dist. N.D. Cal. 1988), is non-binding precedent, and *Kelly v. Robinson*, 479 U.S. 36 (1986), is factually distinguishable.

IT IS SO ORDERED.

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Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re JEFFREY L. SILVERMAN and FAYE J. SILVERMAN, Debtors.	Case No. 1:05-12807-GM Chapter 7 Case Adv. No.: 1:07-01066-GM
NANCY HOFFMEIER ZAMORA, Chapter 7 Trustee, Plaintiff, vs. STATE COMPENSATION INSURANCE FUND, Defendant.	**ORDER DENYING MOTION OF THE STATE COMPENSATION INSURANCE FUND FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF BANKRUPTCY 7056** **DATE: January 9, 2008** **TIME: 1:30 p.m.** **PLACE: Courtroom 303** (Filed Jan. 25, 2008)

On January 9, 2008, at 1:30 p.m., the motion of the State Compensation Insurance Fund (the "State Fund") for summary judgment, or in the alternative, motion for summary adjudication of facts and issues (the "Motion") came on for hearing in the above-captioned Court. Reem J. Bello, of Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP appeared on behalf of the Trustee. Virginia Hoyt appeared on behalf of the State Fund. There were no other appearances.

Having considered the Motion, all papers filed in support thereof and in opposition thereto, the oral arguments at the hearing, and based upon the findings made on the record, and good cause appearing therefrom,

IT IS HEREBY ORDERED that the Motion is denied.

DATED: 1/25/08 /s/ Geraldine Mund
THE HONORABLE
GERALDINE MUND
United States Bankruptcy
Judge

[Proof Of Service Omitted In Printing]

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re JEFFREY L. SILVERMAN and FAYE J. SILVERMAN, Debtors.	Case No. 1:05-12807-GM Chapter 7 Case Adv. No.: 1:07-01066-GM
NANCY HOFFMEIER ZAMORA, Chapter 7 Trustee, Plaintiff, vs. STATE COMPENSATION INSURANCE FUND, Defendant.	**ORDER GRANTING MOTION OF THE CHAPTER 7 TRUSTEE FOR SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF BANKRUPTCY 7056** **DATE: January 9, 2008** **TIME: 1:30 p.m.** **PLACE: Courtroom 303** (Filed Jan. 25, 2008)

On January 9, 2008, at 1:30 p.m., the motion of Nancy Hoffmeier Zamora, the chapter 7 trustee (the "Trustee") of the estate (the "Estate") of the Jeffrey L. and Faye J. Silverman ("the Debtors") for judgment on the pleadings, or in the alternative, motion for summary judgment or summary adjudication of facts and issues pursuant to Federal Rules of Bankruptcy Procedure 7012 and 7056 (the "Motion") came on for hearing in the above-captioned Court. Reem J. Bello, of Weiland, Golden, Smiley, Wang Ekvall & Strok, LLP appeared on behalf of the Trustee. Virginia Hoyt appeared on behalf of the State Fund. There were no other appearances.

Having considered the Motion, all papers filed in support thereof and in opposition thereto, the oral arguments at the hearing, and based upon the findings made on the record, and good cause appearing therefrom,

IT IS HEREBY ORDERED that:

1. The Motion is granted; and

2. Summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 is entered in favor of the Trustee and against the State Compensation Insurance Fund.

DATED: JAN 25 2008 /s/ GERALDINE MUND
THE HONORABLE
GERALDINE MUND
United States Bankruptcy
Judge

[Proof Of Service Omitted In Printing]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

In re JEFFREY L. SILVERMAN Debtor.	Case No. SV05-12807GM Adversary No. SV07-01066GM Chapter 7
NANCY ZAMORA Plaintiff v. STATE COMPENSATION INSURANCE FUND Defendant	**TENTATIVE RULING REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION OF FACTS AND ISSUES** HEARING DATE: JANUARY 9, 2008 TIME: 1:30 P.M. PLACE: COURTROOM 303 21041 Burbank Blvd. WOODLAND HILLS, CA 91367 (Filed Jan. 9, 2008)

Court's written tentative ruling attached to this cover sheet.

United States Bankruptcy Court
Central District of California

San Fernando Valley

Judge Geraldine Mund, Presiding

Courtroom 303 Calendar

Wednesday, January 9, 2008 Hearing Room 303

1:30 pm

05-12807 Jeffrey L Silverman Chapter 7

Adv#: 07-01066 Zamora v. STATE COMPENSATION INSURANCE FUND

#22.00 Defendant's motion for summary judgment, or in the alternative, motion for summary adjudication of facts and issues (fr. 12/19/2007)

Docket #: 15

Party Information

Debtor(s):

Jeffrey L Silverman — Represented By
Stephen L Burton
Randolph L Neel

Defendant(s):

STATE COMPENSATION — Represented By
Virginia Hoyt

Joint Debtor(s):

Faye J Silverman — Represented By
Stephen L Burton
Randolph L Neel

Plaintiff(s):

Nancy J Zamora — Represented By
John D Ott
Reem J Bello

Trustee(s):

The State Fund provided a policy of workers' compensation insurance to debtors. Debtors were accused of criminal fraud by the L.A District Attorney's Office, apparently on an allegation by State Fund. State Fund provided the District Attorney with an estimate of its loss (presumably $101,531, although State Fund does not specifically admit this and there is no copy of the correspondence between State Fund and the District Attorney). The complaint is for violation of Insurance Code § 11880(a) and § 1871.4(a)(4). (π, ex. 2). Things are a little confusing, since there is no copy of the judgment in the evidence given. It appears that I have a copy of the docket (π, ex. 3), which seems to show that no trial actually took place but that there was a plea bargain in which the §11880(a) count was reduced from a felony to a misdemeanor, debtor pleaded nolo contendere and the court found him/them guilty. At that same time the court sentenced Mr. Silverman to a suspended sentence, 36 months probation, and 120 hours of

community service. It is noted on the docket that "$101,531.00 restitution to State Fund Insurance has been completed." The count under §1871.4(a)(4) was then dismissed. It seems that Mrs. Silverman had a slightly different sentence, but I doubt that this is relevant for this motion.

The restitution payment was made on 3/2/05. The debtors filed this chapter 7 case on 4/20/05.

The trustee filed a complaint against State Fund, seeking to avoid and recover the restitution payment as a preference under 11 U.S.C. § 547(b). Trustee filed a motion for summary judgment, alleging that all the elements of §547(b) are met and that State Fund has no affirmative defenses. State Fund filed a motion for judgment on the pleadings or in the alternative for summary judgment, stating that the trustee cannot meet the elements of § 547(b).

Under section 547(b), the trustee may avoid any transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of the filing of the petition; (5) that enables such creditor to receive more than such creditor would receive if the transfer had not been made.

The main argument circles whether payment of a criminal restitution judgment is a "debt" and, if so, whether public policy or the plain meaning of the law

exempts restitution payments from recovery as a preference.

The U.S. Supreme Court has addressed this only in the context of dischargeability of restitution, not avoidability of payment by the trustee. The initial and most widely cited case is *Kelly v. Robinson*, 479 U.S. 36, 49 (1986). In which the Supreme Court sidestepped the question of whether a restitution award is a "debt." However a mere four years later the Court settled this issue in *Pennsylvania Dept. of Pub. Welfare v. Davenport,* 495 U.S. 552, 562-3 (1990). Criminal restitution is a "debt" as defined by 11 USC §101.

Nonetheless, State Fund argues that 9th Circuit case law, along with U.S. Supreme Court authority, dictates that criminal restitution is excepted from preference actions. State Fund bases this on *Kelly* and three other cases:

In *Nelson v. County of Santa Clara*, 91 B.R. 904 (D. NDCA, 1988), a case which fell between *Kelly* and *Davenport*, the district court for the northern district of California held that regardless of whether restitution should be analyzed as a debt, criminal restitution is excepted from avoidance under Section 547. The *Nelson* court relied on the U.S. Supreme Court case of *Kelly*, which held that restitution payments are excepted from dischargeability under §523(a)(7). The *Nelson* court applied that holding to an avoidance action.

I do not find this case persuasive. The *Kelly* opinion dealt with dischargeability, not avoidability. Indeed, even the *Nelson* court conceded that the "historical exception to avoidance of restitution does not appear to be as clearly established as the exception for discharge of restitution . . . ." Had it not preceded *Davenport*, it is likely that *Nelson* would have had a different result since under *Davenport* the Supreme Court sees restitution as basically indistinguishable from other "debt" unless Congress specifically provides such a distinction (as in §523).

State Fund cites to two 9th Circuit B.A.P. cases (*In re Steiger*, 159 B.R. 907 (B.A.P. 9th Cir. 1993) and *In re Warfel*, 268 B.R. 205 (B.A.P. 9th Cir. 2001)) as supporting *Nelson*. However, that contention is not particularly relevant to the preference issue because both of those cases dealt with dischargeability, not avoidability. [Interestingly *Steiger never* mentions *Davenport* and *Warfel* only notes it in passing. While *Davenport* was overruled by statue as to the dischargeability of criminal restitution awards in chapter 13, it remains controlling as to the broad definition of "debt." *See Johnson v. Home State Bank*, 501 U.S. 78, fn. 4 (1991).] The connection that *Nelson* makes between avoidability and dischargeability is tenuous. Indeed, a number of other courts have refused to follow *Nelson*, reasoning that the application of *Kelly* to preference actions is misplaced.

For example, in *In re Lacefield*, 167 B.R. 89 (Bankr. E.D. Ky. 1994) the bankruptcy court for the eastern district of Kentucky held that the principle of

exception to dischargeability should not be applied in an avoidance context, because in this regard, congressional intent is clear, and the statute must be enforced according to the terms of Section 547(b). "All of the elements of that section, as set out above, apply in the case of a criminal restitution obligation. It does not fall to this Court, or any other, to carve out some 'exception' to that section which the Bankruptcy Code does not contemplate. In fact, Section 546 specifically sets out the limitations on the trustee's avoiding powers. In addition . . . avoidance of the restitution obligation does not extinguish it, nor does it preclude the defendant from challenging its dischargeability in a separate action."

In *In re Currey*, 144 B.R. 490 (Bankr. D. Idaho 1992) the bankruptcy court for the district of Idaho correctly noted that the *Nelson* decision did not provide an historical statutory or decisional basis for excepting restitution payments from preference recovery, as was the case for excepting discharge of those obligations under Ch. 7. That is the inherent problem with *Nelson*: it does not provide a historical justification for excepting restitution payments from avoidance actions as did the *Kelly* Court in excepting restitution payments from discharge. As such, the plain language of the statute should apply, and under the plain language, no exception exists.

To the above, I would add that (1) if Congress intended to exclude restitution awards from a preference action, it knows exactly how to do it and (2) public policy does not require restitution judgments

to be treated differently from other payments received in the preference period. I state this second position because there is almost an artificial distinction between fraud/conversion cases which lead to a criminal action and those which are left to the civil courts. As we are well aware in the bankruptcy courts, law enforcement is simply not available to investigate smaller crimes or those which are not at the top of the prosecutor's agenda. And if law enforcement is tied up with the war on drugs or the prosecutors are swamped with such cases, white collar crime falls by the wayside and the aggrieved party is left to its own devises – namely a civil suit. Thus there is no justifiable reason to set aside a restitution payment in a civil suit and not in a criminal one. After all, restitution [here I exclude the term "restitution fine" used in the California Penal Code as discussed below] is merely another word for "damages."

For example, the various definitions in Black's Law Dictionary, 8th edition, make it clear that State Fund would have received the same amount whether it sought restitution through a criminal action or a civil one:

restitution, n. 1. A body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment. See UNJUST ENRICHMENT. 2. The set of remedies associated with that body of law, in which the measure of recovery is usu. based not on the plaintiff's loss, but on the defendant's gain. Cf. COMPENSATION; DAMAGES. 3. Return or restoration of some specific thing to its

rightful owner or status. 4. Compensation for loss: esp., full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.

damages, n. pl. Money claimed by, or ordered to be paid to, a person as compensation for loss or injury <the plaintiff seeks $8,000 in damages from the defendant>.

restitution damages. Damages awarded to a plaintiff when the defendant has been unjustly enriched at the plaintiff's expense.

Having decided that criminal restitution is not a unique award entitled to special protection, I must now determine whether the complaint meets each of the requirements for a preference.

I. Whether the restitution payment was "to or for the benefit of a creditor":

State Fund argues that criminal restitution operates for the benefit of society as a whole, rather than for the benefit of victims, citing *Kelly* as support for the argument that restitution payments are not to or for the benefit of a creditor. In *Kelly*, the court stated that "neither of the qualifying clauses of 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole.

Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant."

This may be true under the Connecticut statue, but the California law of restitution is quite different from that of Connecticut, which was the basis of the *Kelly* ruling, In Connecticut all restitution payments are made to the probation office and then forwarded to the victim. The victim has no independent right to enforce a restitution order, but must have the prosecutor go back to the trial court for a warrant to arrest the defaulting defendant as a violation of a condition of probation. *Kelly*, 479 U.S. at 40-41.

California law makes it clear that the payment is for the benefit of the creditor and is made directly to that creditor. Penal Code §1202.4 begins:

"(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime *shall receive restitution directly from any defendant* convicted of that crime."

This statute goes on to state:

"(a)(3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay both of the following:

(A) A restitution fine in accordance with subdivision (b),

(B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which *shall be enforceable as if the order were a civil judgment.* [emphasis added]

PC 1202.4(f) begins:

"(f) Except as provided in subdivision (q), in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, *based on the amount of loss claimed by the victim* or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." (emphasis added)

Thus, in California there is a direct relationship between the victim and the defendant when it comes to collection of restitution.

Further, in California there are two types of restitution. One is the restitution that will make the victim whole and the other is a "restitution fine" that is meant to be punitive. It is clear from PC 1202.4 that the court is to grant restitution in the amount of the loss (subsection f). This, apparently is different from the Connecticut situation or *Kelly* would not say that the "victim has no control over the amount of restitution awarded or over the decision to award restitution." Here State Fund admits that it provided the district attorney with its estimate of loss.

In California, the court is also to impose a "restitution fine" of between $100 and $1,000 in the case of a misdemeanor (subsection b(1)). This is separate and apart from the "restitution" ordered in subsection f.

Because of the plea bargain and the fact that the restitution was paid even before the court reviewed the plea bargain, the amount of the restitution did not contain any "restitution fine," but was equivalent to the damages suffered by State Fund.

It is also not clear that the state ever did more with this restitution check than hand it over to State Fund or mail it to them. It is in the form of a cashier's check made payable to State Fund. The check is dated 3/2/05 and mailed on 3/18/05 to State Fund (Δ, ex. B). So it looks like the Silvermans brought this check to the district attorney, who forwarded it to State Fund. Whether or not this was what happened, the fact of the matter is that the restitution payment was ultimately made to State Fund and thereby

vitiated any civil rights to collection that State Fund would have had.

Thus I find that under California law and under the undisputed facts of this case, the restitution payment was "to or for the benefit of a creditor."

II. Whether the restitution payment is considered debt:

The trustee asserts that criminal restitution obligations are debts. This was resolved under *Davenport* and reiterated in *Johnson* and so no further analysis is needed. Under 11 USC §§ 101(4) and (12), restitution obligations are considered debt.

III. Whether the payments were made while the debtor was insolvent:

State Fund does not deny these allegations in the opposition or their motion of summary judgment. There is a presumption of insolvency on and during the 90 days prior to filing a petition. That presumption has not been defeated in this case.

IV. Whether the payment was made on or within 90 days of filing the petition:

This assertion by the trustee has not been denied. The payment was received on March 18, 2005. The petition was filed on April 29, 2005.

V. Whether the payment enabled State Fund to receive more than it would have received in a Ch. 7 liquidation if the payment had not been made:

The trustee argues that the debtors' liabilities exceed the assets. State Fund argues that conviction for insurance fraud constitutes an exception to discharge and thus the restitution amount would not have been available to creditors. This same argument could be made in every case where discharge is or can be denied under 11 USC §523(a). Such a holding would gut the preference statute. It is hard to believe that State Fund is making this with a straight face. Obtaining a nondischargeable judgment and actually collecting on it post-petition are two very different things as I am sure that State Fund knows, which is probably why it is fighting the trustee on this case.

Conclusion:

State Fund's motion for summary judgment is denied. The trustee's motion for summary judgment is granted.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of: JEFFREY L. SILVERMAN and FAYE J. SILVERMAN, Debtors, STATE COMPENSATION INSURANCE FUND, Appellant, v. NANCY HOFFMEIER ZAMORA, Chapter 7 Trustee, Appellee.	No. 08-56508 D.C. No. 2:08-cv-01311-VBF Central District of California, Los Angeles ORDER (Filed Sep. 14, 2010)

Before: SCHROEDER, FISHER and N.R. SMITH, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Appellant's petition for panel rehearing is therefore DENIED.